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EPC on The Link between Brussels I and Rome II in Cases Affecting the Media

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In this article we consider both Brussels I and Rome II as together they set rules to determine which Court should hear a case (Brussels I), and which country's Law should be applied (Rome II) when there is a cross-border conflict including in the case of Brussels I, cases brought against the media for defamation and violations of privacy.

At present, Rome II does not apply to the media, whereas Brussels I does. Even though the European Parliament passed a very sensible amendment from MEP Diana Wallis with the full support of a broad alliance of MEPs and stakeholders, Member States rejected the wording with the backing of the Commission. As a compromise, it was agreed that the media would be excluded from Rome II, a Study undertaken and the matter reviewed at a later time.

But media companies need the legal certainty when they publish – whether in print, on TV or online, that the editorial content complies with the law and any self-regulatory codes which apply where the final editorial decisions are taken. As more and more content is made available outside the country of first publication this legal certainty is ever more important in order to uphold the freedom of expression.

The current Brussels I regulation creates the very opposite – uncertainty and disproportionate risk of law suits in multiple jurisdictions. Plaintiffs often choose to sue publishers and journalists in a particular jurisdiction solely in order to benefit from the most favourable judicial proceedings as regards (a) the choice of the forum and consequently (b) the law that will apply to that case (determined by national conflict of law rules). This inevitably encourages a plaintiff to seek redress for the local damages in multiple countries and according to different laws.

Although both Regulations are now under review at EU level, there are no specific references in the current consultation on Brussels I to the article which affects the media – 5(3). Therefore we take this opportunity to call for amendments to Brussels I to remove the uncertainty which 5(3) and the *Shevill* case have together created. This is because in all cross-border cases of defamation and privacy violations, the *jurisdiction* under Brussels I is the first matter to be settled, the absence of a rule to determine thereafter which country's *law* should apply is an issue for media companies when defending cases of defamation and violations of privacy in countries outside the place of editorial control because under Brussels I, media companies find themselves defending cases according to foreign laws, often in multiple jurisdictions (see Case ECJ C-68/93 *Shevill and Others* [1995] ECR I?415, paragraph 19 where the claimants were established in England, France and Belgium and the alleged libel was published in a French newspaper with a small circulation in England. The ECJ held that, in the case of a libel in the press:

- the place where the damage occurs is the place where the publication is distributed, when the victim is known in that place (paragraph 29) and
- the place of the event giving rise to the damage takes place is the country where the newspaper was produced (paragraph 24).

The ECJ also held in Shevill that as regards the assessment by the English court applying Article 5(3) of Brussels I of whether "damage" actually occurred or not, the national court should apply national rules provided that the result did not impair the effectiveness of the general objectives of the Regulation. Furthermore the ECJ held that where a libel causes damage in several different EU Member States, the victim may sue in any of the jurisdictions where the libel is published in respect of the damage suffered in that jurisdiction.

We need to find a solution which ideally spans the two instruments, removing the threat of forum shopping by claimants and increasing legal certainty for journalists and publishers which is vital as cross-border news reporting increases. Note that since the Regulations were first enacted:

- Content is more readily available outside the country of first publication because of internet use and therefore legal certainty is extremely important in order to uphold the freedom of expression. As well as the press online, increasingly TV programmes are cross-border via VOD as well as via satellite TV.
- There has been a discernible rise in case law and particularly in relation to electronic publications and dissemination of online news on various platforms. The plaintiff can easily claim the competence of any court and applicable law since the information is accessible from any country online.
- There has been a general misperception that this problem of forum shopping is only with/in UK whereas in reality there are many examples from other countries of manifest abuse of the current system.

Of course, the EPC does not question or wish to undermine the ability of any individual's access to justice but we feel we must point out that the current combination of forum shopping and applicable law provides an unbalanced advantage to the plaintiff and therefore directly prejudices editorial independence and press freedom in the different states, often leading to journalists self-censoring, simply to avoid *the possibility of* litigation.

The most proportionate solution would be to remove the media from the scope of article 5(3) which, together with *Shevill* gives rise to legal uncertainty and the dangers of both forum shopping and multiple actions. Instead the media should be subject to the general rule in Article 2.1 which allows plaintiffs to bring cases in their home country for cross border claims of defamation and privacy violations.

On the grounds that Brussels I gives the plaintiff full rights in determining which Court should hear their claim, given that this may not be in the country of the place of editorial control of the publication, we argue that a balanced proportionate approach should mean that any rule determining which laws should apply in such cross-border cases should be the law in the country where editorial decisions were taken.

Perreau-Saussine on Rome II and Defamation

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1. The "Rome II" Regulation deals with harmonized conflict-of-law rules relating to non contractual obligations. Unfortunately, it was left incomplete as, *inter alia*, no consensus was reached on the suitable applicable law to non-contractual obligations arising out of violations of privacy and personality rights. However, the Commission made it clear that the debate should be re-open (cf. article 30 of the Regulation), and this is precisely the object of Mrs Wallis's *Working Document on the Amendement of Regulation EC N°864/2007 on the law applicable to non-contractual obligations*, which offers an insightful overview on the matter

2. As the *Working Document* points out that "the unification of Member State laws on non-contractual obligations arising out of violations of privacy and personality rights is not a feasible option at the present stage of European legal integration" (p.7), this paper will focus on the harmonization of conflict-of-laws rules in this area of law, and, more precisely, on what could be the conflict of law rule suitably include in the "Rome II" EC Regulation. In line with the general principles of the "Rome II" Regulation, the *Working Document* recalls that the conflict-of-law rule must be "neutral", *i.e*. independent from all the parties involved's interests – which is said to be "very difficult" (p. 9) – and insure legal security and predictability. Moreover, the non-contractual obligations arising out of violations of privacy must put up with two specific problems, namely the "distance publication problem" – the place of the event giving rise to the damage and the place where the damage materialises are not the same – and the "multiple publications problem" – the damage materialises in several places.

In the *Working paper*, several connecting factors are discussed:

– the “place in which the tort took place” (1);

– the “place in which the damage materialises” (2);

– the “place of the publisher’s establishment” (3);

– a flexible rule based on choice of the applicable law either by the parties or the judge (4).

Scrutinizing both the *Working Document* and the *Mainstrat study*, it is clear that none of those four conflict-of-laws rule satisfies *per se* both the media organisation and the plaintiff’s interests. The media organisations tend to reject conflict-law rules n°1-2-4, blaming their lack of predictability for the defendant, and advocate the use of connecting factor n°3. If this option satisfies the need for predictability and insures that both the “distance publication problem” and the “multiple publications problem” can be sorted out, such a rule is obviously ill-balanced in favour of the defendant, and cannot be chosen for that very reason.

3. When analysing the process which led to the exclusion of the scope of the “Rome II” EC Regulation of non-contractual obligations arising out of violations of privacy and rights relating to the personality, one of the most striking feature is how soon a *special* conflict law rule has been discussed, without having really challenged the suitability of the *general* rule of article 4 (connecting factor n° 2). On the contrary, considering, first, the general structure of the “Rome II” Regulation and, next, the general trend of the *Working Document,* and specially the list of the “things which need to be determined” (displayed in page 8), it is clear that:

– the general rule of article 4 cannot be set aside unless it has been proven that is not suitable for a category of torts: there should be good reasons to deviate from that rule.

– as the preliminary provisions of the Regulation put it (point 16), the general rule fulfils the legitimate expectations of both the publisher and the person harmed. Moreover, article 4.3 matches the need for flexibility mentioned in the *Working Document* (p. 10).

– most media organisations find it impossible to apply the general rule without adapting it.

4. That said, one of the main question is: what are the changes that ought to be brought to the general rule of article 4 to make it acceptable and applicable to non-contractual obligations arising out of violations of privacy and rights relating to the personality?

- **Article 4.1**:

Following the Commission and the European Parliament proposals, an exception to article 4.1 should be made for the right of reply, which should remain governed by the law of habitual residence of the defendant.

The *first objection* to the application of that rule to non-contractual obligations arising out of violations of privacy and rights relating to the personality is the "multiple publications problem": it can probably be solved by using the exception clause of article 4.3 which would allow the judge, in certain cases, to apply a single law to the whole case. The media's *second objection* to the general rule of article 4, concerns "the possibility of a journalist losing a case under a foreign law when the material published conforms with the law of their place of establishment". The *Working Document* wonders whether an "exception to the effect that a publisher should not be liable under a law that is contrary to the fundamental rights principles of its place of establishment" (p. 8) could be included. It is quite clear, however, that the drawbacks of such a rule would outweigh its advantages, for several reasons:

– first, some guidelines would have to be given as to what is a "fundamental rights principles", and, obviously, this expression must receive a narrow interpretation;

– secondly, it will need to decide which mechanism is at stake: does it mean that the forum will have to apply a foreign public policy rule (and in that case, it is not sure whether it will it be eager to enforce the public policy of a foreign state), or are those rules part of the "lois de police", in which case, the rule will be contrary to article 16 of the "Rome II" Regulation, which does not allow a judge to apply foreign mandatory rules…

– finally, can all the "laws of the place of establishment" be treated on the same level? One can understand that a mandatory rule of a Member state where the publisher is established, which shares some common principles with the forum (specially considering the principles settled by the European Convention of Human rights), could be applied by the forum, but what if the law of the place of

establishment is very different from the law of the forum? What, specially, if the fundamental rights principles of that foreign country is contrary to the public policy of the forum? What if it appears to be contrary to a principle of EC law?

- **Article 4.2:**

The situation would be a journalist working in France sued for a publication in, say, England, concerning the privacy of a French-based 'celebrity'. No doubt that article 4.2 would satisfy the interest of both parties and should be applied in this field of law. Moreover, it would allow a French forum to take over the case and apply its own law, on the basis of both articles 2 and 5-3 of the "Brussels I" Regulation (even though the English tribunals would also have jurisdiction on the basis of article 5-3).

- **Article 4.3:**

The possibility of applying article 4 to non-contractual obligations arising out of violations of privacy and rights relating to the personality depends greatly on how the exception clause based on the "closest ties" is drafted and used. The uncertainty involved in a bare *closest ties* exception rule must be limited by giving clear guidelines to the judge as to how to use this exception clause in this field of law. As the *Working Document* puts it, the main drawbacks of the exception clause "could be overcome by including criteria upon which the test is to be based" (p. 8). The judge liberty could also be limited by the inclusion of a "forseeability clause", whereby a law of a country would be applied if the damage occurred in this country was foreseeable for the defendant.

Lord Lester's Defamation Bill on Jurisdiction

As an addendum to the current symposium on Rome II and Defamation, Hugh Tomlinson QC at the International Forum for Responsible Media Blog has written a piece on the current proposals in Lord Lester's Defamation Bill as to when an

English court could assume jurisdiction over claims involving publication outside the jurisdiction. The current Clause 13 of the draft Bill reads:

> *(1) This section applies in an action for defamation where the court is satisfied that the words or matters complained of have also been published outside the jurisdiction (including publication outside the jurisdiction of any words or matters that differ only in ways not affecting their substance).*
>
> *(2) No harmful event is to be regarded as having occurred in relation to the claimant unless the publication in the jurisdiction can reasonably be regarded as having caused substantial harm to the claimant's reputation having regard to the extent of publication elsewhere.*

Read the Inforrm blog post for a full analysis of the clause.

Country of Origin Versus Country of Destination and the Need for Minimum Substantive Harmonisation

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The views that are displayed below are an extract from the opinion I had occasion

to rule on the so-called Mainstrat's Study made for the Commission with my colleagues of the University of Basque Country.

The first question to be solved is whether we should continue with the process of harmonization initiated in the field of civil non-contractual obligations, taking it into the field of violations against personality rights. In case of a positive answer we have to decide which are the methods to be used; also, if harmonisation of conflict-of-laws is a workable and satisfactory solution.

Given the difficulties of reaching a formula acceptable to all involved, we should deliberate if it would be possible to develop neutral conflict rules that, being suitable for balancing the interests of the alleged author of the damage and the injured party, might thereby serve to achieve the desired consensus.

For a potential, satisfactory unified conflict-of-law rule, its workings must guarantee a sufficient level of protection for the participants in a cross-border situation, on the one hand, and that the judicial-political conditions of the market in which they operate effectively places them in a position that ensures an equal treatment for both of them, on the other hand. Only if it can be guaranteed that neither party to the process can avoid these minimum protection standards in its actions can a unification of conflict-of-law rules be produced. For this it is necessary to ensure a balance and equality between the parties, their full knowledge of the rules of working of the market, and a high level of predictability of costs and benefits of the action or case that they are going to bring. Only under such conditions unification of conflict-of-law rules may be considered a valid tool for harmonisation.

The envisaged outcome could be based on the principle of country of origin (we follow Prof. M. Virgos Soriano and Prof. Garcimartin Alferez when they explain the meaning of "country of origin" in the European framework). The principle of country of origin starts from the assumption that market operators sell their products or render their services in accordance with their own terms. When it comes to opting for the law, they choose the most favourable one: usually, the law of their domicile or their establishment. In this way the risk and amount of costs inherent to cross-border actions fall on the other party -the buyer- who, knowing that in the event of dispute he will be subject to a foreign law, accepts it as part of the deal and is in a position to decide whether to proceed or not with the transaction. Translated into the field of infringements of personality rights or

defamation by the media, this means that both parties -the injured one and the author of the injury-, should be on equal terms.

The principle of the country of origin poses difficulties when the situation of the participants is not the one that we have assumed, that is, if one of the parties is in a weaker position in relation to the other; also, when from the circumstances of the case it emerges that one of the parties does not have the same guarantees as the other – as it happens with non-contractual obligations. In this case, the party in the favourable position can succeed in choosing the applicable law considering only his/her own interests, taking advantage of the weakness or inequality of the other party: therefore, private international law designed to follow the country of origin principle fails. In the case of non-contractual obligations, if the injury's author can choose the law applicable to potential non-contractual damage caused by his/her actions, he/she will choose the one that is most favourable, even before the damage has occurred. That means that the injured party will have to face conditions set down even before he/she became a party. In such situations, the law of the country of origin must be abandoned and the law of the country of destination should be preferred.

The logic of the law of the country of destination presupposes a difference between the parties and re-establishes a balance by choosing the law that favours the weaker party. It thereby ensures that the other party must comply at least with the minimum requirements of the law most closely linked to the injured party. The unequal position in which the parties find themselves requires that the cost of the international nature of the case fall on the party that is in the most favourable position.

This is the option chosen by the Rome II Regulation: article 4 establishes the law of the place in which the direct injury occurs or might occur. In the context of infringements against personality rights or defamation caused by the media, the first draft of the Regulation also favoured this option by including them in article 6. Article 6 of the First Draft of the Regulation refers us back to the general rule of article 3 (current art. 4 RII). Following the logic of the law of the country of destination of article 4 R II, the law applicable will be that of the place in which the damage occurs: in cases of infringements of personality rights or defamation, the place where the injured person suffers the injury to their privacy or private life; or where the effects of this infringement are most severe. This will usually be the victim's place of residence. This does not exclude the possibility that this

option will be complemented by an exception clause applicable to cases in which another law has closer links.

Amongst the advantages of the locus damni it may be highlighted that it usually coincides with the victim's residence, therefore constituting a close link for the victim which is also predictable for the person alleged to be responsible (usually the victim of defamation committed by the press will be known by the author of the damage, who can therefore easily determine where his/her residence is, and which law will be applicable in the event of dispute).

Not surprisingly, criticisms from the press associations to this conflict of law rule have been overwhelming. On the one hand, they cite the difficulty in knowing the victim's residence. Also, that it might happen that although the product complies with the laws in force in the country of the publisher's establishment, and no copy of it has been distributed in the country of residence of the victim, it may end up with the law of the victim's place of residence being applied. Nevertheless, this argument should not detain us because if no injury occurs in the victim's place of residence it does not matter which system of laws should apply.

If we follow the logic of the country of origin, as suggested by the press and the media, the costs of the international aspects of the case will be suffered by the victim of the action carried out by third parties: an action in which he/she has no negotiating capacity as he/she knows nothing about, and cannot foresee it since the person initiating the action is fully in command; the inequity of the arrangement is unquestionable. The victim cannot predict the result because he/she does not know where or whom the injury will come from. What's more: faced with this advantageous situation, the author can choose the country of origin that best suits him/her, and in which the regulations applicable to his/her activity will be the most favourable, without the victim having any saying or decision-making power.

Given the difficulty of breaking the stalemate on this aspect, another possibility is to try and put an end to the problems inherent in the existing substantive diversity by means of harmonisation through the establishment of a few common minimum principles. And we can say that the way has begun with the Judgement of the Court of 16 December 2008, case C-73/07.

European legislation could prevent inequalities or defects in the market by

establishing minima where such deficiencies are present. If all legal systems provide a satisfactory level of protection to the victim of violations against personality rights, it would not be so attractive to the perpetrator to opportunistically seek the most favourable legal system, because all of them would have adhered to the substantive minima laid down at the community level.

As a matter of fact, unification of conflict rules should not be presented as an alternative option to substantive harmonisation of the legal systems of member states, but as an additional option. The most satisfactory solution for assuring a minimum level of concordance among legal systems to prevent problems connected with the diversity of legislation is to seek the appropriate combination between mechanisms for harmonisation of conflict-of-law rules and a certain amount of minimum substantive harmonisation. Frequently, the success of measures intended to harmonise conflict-of-law rules at the European level will depend on bringing substantive legislation and the general principles of national legal systems closer together. Thus it may be advisable in non-contractual matters to coordinate the unification of the conflict-of-law rules route with initiatives on partial harmonisation. Indeed, only harmonisation of the principles or substance of national law could justify use of the criterion of country of origin instead of the country of destination, the natural conflict-of-law rule in non-contractual matters.

Heiderhoff: Privacy and Personality Rights in the Rome II Regime – Yes, Lex Fori, Please!

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I. Overview

It would seem that there are already three camps in the symposium. The first two contributions (*Wallis'* working paper, even if very carefully phrased, and *von*

Hein's paper) are both in favour of specific regulation to deal with violation of privacy and defamation in Rome II and have both stressed the importance of finding a balanced approach. Whilst the working paper is more strategic and, understandably, refrains from formulating a potential rule, *von Hein* has designed a full rule. In doing so, he has opted for a system that is, vaguely, similar to the Romanian one that *Wallis*' working paper presents as an example: the location of the injured party's habitual residence is taken as primarily decisive and this is then combined with a foreseeability rule. There is more to *von Hein's* suggestion, which will be touched on below.

Boskovic's paper also favours the integration of defamation into Rome II. However, she is promoting the application of article 4 Rome II – or, in other words, she simply wants to delete the exception in article 1(2) (g) Rome II.

The last two contributors (*Dickinson* and *Hartley*) prefer maintaining the status quo for the time being. In particular, they highlight the current revision of the Brussels I Regulation as a reason to hold off. However, it seems that article 2 and article 5 (3), which are applicable to jurisdiction in defamation cases, are not under reconstruction. There is no reason to believe that the Shevill doctrine will be changed in the near future. On the contrary, it may be advisable to draft a conflict rule soon so that, if necessary, Brussels I can be changed accordingly. Nevertheless, this position raises a very important point: Jurisdiction and applicable law are, at least in the eyes of English lawyers, often perceived as closely connected.

It seems that, as far apart as they may sound, at least the two extreme positions should be reconcilable.

II. Important issues

If a new rule on the violation of privacy rights and defamation is aspired to, then first and foremost its task must be to consider and weigh the interests of both parties. This is an obvious need with regard to the injured party. However, even more than in other cases of tortious liability, the injurer must also be protected, as he/she is acting within the sphere of basic rights, namely the right to free expression. Therefore, article 4 Rome II seems unsuitable for privacy violations.

In trying to balance potentially conflicting interests, one faces two layers of

difficulty. Firstly, there is the conflict of basic laws as mentioned above. Secondly, this conflict between freedom of expression and privacy is viewed and weighted quite differently all across Europe. It is, therefore, not easy for a European conflict of laws rule to weigh the various interests in a manner that all member states will find acceptable. The task of finding a solution to this conflict is set be fulfilled by the new rule. However, it must be solved not only in PIL, but also in procedural law, when fixing jurisdiction.

Certainly, in international procedural law we are at a completely different point. Unlike Rome II, Brussels I already comprises claims based on the injury of privacy rights and the ECJ has formed a rule on how to cope with multi-state cases. The court shaped the Shevill doctrine very carefully and, it appears, acceptably. The Shevill doctrine excludes exorbitant cherry-picking for the injured and, at the same time, impedes publishers from retreating to libel havens (if they exist).

III. Lex fori solution

Having such a balanced procedural rule (even if it is judge-made) for jurisdiction, it seems obvious to test its suitability for private international law (PIL). In doing so, it is obvious that one cannot merely transpose the entire rule into PIL. Were one to do so, the result would be ridiculous: the claimant would be allowed to choose both the forum and, independently, the applicable law. If an Italian newspaper reported, in a defamatory manner, on an English actress, the actress could opt to sue the publisher in England under Italian law – or vice versa. This risk, it appears, is not quite precluded in *von Hein's* approach. His draft rule *allows* the injured party to choose the law of the forum – but what if they don't? Why not force such synchronization?

By applying the lex fori, as Wagner has suggested (e.g. in the hearing), this goal is easily reached. At the same time, the somewhat contentious foreseeability test is side-stepped and, maybe more importantly, the application of foreign law in a legal field, where cultural differences truly exist, is completely proscribed.

At first glance, this seems a very un-German suggestion. After all, the lex fori paradigm is an English one and it is usually something of a taboo in continental systems. In defamation and privacy cases – and in combination with Shevill – such prejudice should be overcome, as the lex fori offers all the required advantages.

The Shevill approach has, admittedly, got its own disadvantages. While *Wallis* claims that "*By providing a mechanism for informed choice, either by the judge or the parties themselves, from all of the available options, the conflict-of-law rule is far more likely to designate the most suitable law in practice*" – this is only partly true. For one thing, following the Shevill doctrine, it is not the court that chooses the applicable law: it is always the party choosing the court that, thereby, automatically chooses the law. Now, the party obviously doesn't make the choice personally, but acts on the advice of a lawyer. Even for a lawyer, however, it must be noted that choosing the best forum for the party is extremely difficult and mistakes will occur.

IV. End

In many papers, here and before, it has been assumed that violations of privacy rights and defamation are rare, because judicial protection is effective. Still, it should be effective *and fair.* Only where there are balanced rules, can media and injured parties can be certain that their rights are adequately and equally considered.

Fairness, it seems, can be reached by a conflict of law rule much more simply than by a minimum standard or unified material rule. Why should a country like France, that has article 9 cc protecting privacy, and a country like England, where, as Hartley has put it "*if something is true, you should (usually) be allowed to say it*", be forced into parallel standards?

Boskovic on Rome II and Defamation

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Many recent studies on defamation and violations of rights relating to personality assert that both jurisdiction and choice of law rules in this area are problematic. The following observations will mainly focus on choice of law.

However, it is worth saying that jurisdiction rules, laid down by the Brussels regulation (articles 2 and 5-3) seem globally satisfactory, even though one has to recognise that they need to be adapted to torts committed via the internet. The mere possibility to access a website from the forum State should not be considered sufficient to found jurisdiction under article 5-3. Closer connection with the forum (through the idea of targeting) should definitely be required. This adaptation does not require legislative intervention, the ECJ can do it. However one problem remains. Under article 5-3 (as interpreted in *Shevill*) when jurisdiction is based on the place of damage, the remedy must be limited to damages arising in the forum State. The problem is that for some remedies, it is impossible or at least difficult to limit the remedy so that it does not have an impact in other countries (it is possible for damages, less so for injunctions). However the French *Yahoo* case (TGI Paris 20 nov. 2000, JCP 2000, Act, p. 2214) shows that it can be done.

Concerning choice of law, the situation is different. The working document of the European Parliament questions the necessity of legislative intervention and envisages the option of maintaining the status quo. It is submitted that this would be an unsatisfactory solution from the point of view of legal certainty. Whatever one thinks of the Rome II regulation and the rules it lays down, it can not be denied that its main objective, that is improving legal certainty, has been attained. The same reasons justify legislative intervention in the area of defamation, area in which conflict of law rules in the member States vary considerably.

Having said that, the main question is obviously what is the appropriate choice of law rule?

Several options had been envisaged during the elaboration of the Rome II regulation. Basically these were the law of the habitual residence of the victim, the law of the place of damage subject to certain exceptions and the law of the country to which the publication is principally directed. The first two were perceived as being more claimant-friendly and the last one as being more favourable to the media.

Actually the country to which the publication is principally directed is not as such, necessarily, more favourable to the media. What explained that perception was that the European Parliament proposed to apply the law of the country in which

editorial control is exercised whenever it was not apparent to which country the publication was principally directed. This is definitely favourable to the media and in contradiction with the general orientation of the regulation which chose to give relevance to the law of the place of damage as opposed to the law of the place of acting. The law of the country to which the publication is principally directed is a variant of the law of the place of damage and shall be discussed as such.

As for the law of the habitual residence of the harmed person, apart from the general criticism of being too favourable to the claimant three other criticisms were to be found. The first was uncertainty, based on the fact that celebrities' habitual residence is difficult to determine. This is very unconvincing. The second and third are linked. The idea is that this connecting factor makes it possible for a media to be held liable for behaviour perfectly legal in the place of acting and hence constitutes a danger for freedom of speech. The first part of the argument is correct, but this is true of any connecting factor other than place of acting, which precisely was rejected by EU authorities. Does the fact that the harmful act involves exercise of a fundamental right change something? Proponents of this argument think so. They take the example of foreign dictators who would become impossible to criticise under the law of their residence, which probably considers any criticism ipso facto defamatory. This would endanger freedom of speech. The argument seems slightly excessive. Surely, in such cases the public policy exception (ordre public) could apply and constitute a sufficient barrier against such laws.

However, there is one argument against the law of the habitual residence of the victim that seems valid. Defamation and violations of rights relating to the personality involve two fundamental rights: freedom of speech and the right to privacy. The way nations all over the world strike a balance between these rights is very different. Hence, it appears that each State should remain in charge of striking that balance for its own territory. This consideration points to the law of the place of distribution, that is the law of the place of damage. Of course this connecting factor needs adaptation in the context of the internet (distribution, as a positive action has no sense in this context). Mere accessibility of a website should not be considered as distribution. Some targeting should definitely be required (this problem would be avoided with the law of the habitual residence of the victim, rejected for aforementioned reasons).

So it appears that the general rule (article 4-1) could perfectly apply to

defamation. This is not necessarily true for article 4§2. Initially, one could think that there is no reason to treat defamation and violation of rights relating to personality differently than other non contractual obligations. This would mean that article 4§2 should apply. On second thought, several reasons come to mind. First of all, applying article 4§2 would hinder the possibility of each State striking the aforementioned balance as it thinks fit. Secondly, the general justification of the exception in favour of the parties' common habitual residence is that this law has closer ties with the case than the law of the place of the damage which is often fortuitous. But precisely, the place of damage in cases we are concerned with is not fortuitous (the media know where the defamatory article, for example, will be distributed), provided that place of damage in the context of internet be defined in a more demanding way.

However, this does not mean that common habitual residence would have no relevance whatsoever. It could certainly be taken into account by the court within the general "closest ties" exception. This exception provides for flexibility and allows for the application of several laws (of places of distribution) or one unique law (possibly of the parties' common residence) according to the circumstances.

This possible application of multiple laws is often seen as a serious disadvantage of the law of the place of damage rule. However, one may wonder why this is considered to be such a problem in this area, while it is accepted in others, such as unfair competition. In any case the existence of the general closest ties exception would allow to limit the negative effects of the place of the damage rules in extreme cases.

So at the end of the day, the only real problem with the place of damage rule is the internet and defining the place of damage in its context. It appears that it is probably preferable to leave this question to the courts and not lay down a final rule at this stage (although one can say that some targeting must be required).

In any case the public policy exception (ordre public) should apply and should be a sufficient barrier against laws which do not respect the requirement of the European Convention on human rights. No specific exception is needed.

Privacy and Personality Rights in the Rome II Regime – Not Again?

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Art. 1(2)(g) of the Rome II Regulation (Reg. (EC) No. 864/2007) excludes from its scope "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation". In its statement on the Regulation's review clause (Article 30), the Commission undertook as follows:

> *The Commission, following the invitation by the European Parliament and the Council in the frame of Article 30 of the 'Rome II' Regulation, will submit, not later than December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality. The Commission will take into consideration all aspects of the situation and take appropriate measures if necessary.*

The comparative study, prepared for the Commission by its contractors Mainstrat and supporting cast, was published in February 2009. We should not quibble about the two month delay – these review clause deadlines are not, after all, to be taken too seriously. No doubt, the Commission needed a little extra time to take into consideration "all aspects of the situation" and to identify any measures which it thought "necessary". Should its silence on the matter in the following 18 months be taken, therefore, as a tacit acknowledgement that nothing needs be done at this point in time? Or just that the Commission has more "important" fish to fry (such as 200-years of European legal tradition in the area of contract law – a discussion for another day)?

The European Parliament, for one, seems unhappy with the present state of affairs, and this should not come as a surprise. This aspect of the review clause was all that the Parliament had to show for the considerable efforts of its rapporteur, Diana Wallis MEP, and her colleagues on the JURI Committee during the discussions leading to the Rome II Regulation to broker a compromise

provision acceptable to the Member States, the media sector and other interested groups. Those efforts proved futile, doing little more than opening what the former Vice-President of the European Commission, Franco Frattini, described with a classical nod as *la boîte de Pandore* (an expression that appears more earthily in the English translation of the Parliamentary debate as "a can of worms").

In her Working Document, Diana Wallis acknowledges that "[t]he history of failed attempts to include violations of privacy and personality rights within the scope of the Rome II Regulation shows how difficult it is to find a consensus in this area". To illustrate those difficulties, it may be noted that at a meeting of the Council's Rome II committee in January 2006, no less than 13 different options for a rule prescribing the law applicable to non-contractual obligations arising from violations of privacy and personality rights were apparently on the table. The topic, with its close link to the fundamental human rights concerning the respect for private life and freedom of expression, inevitably attracts strong and disparate reactions from the media, from civil liberties groups, from those representing celebrities and other targets of "media intrusion" and from politicians of all colours. Inevitably, any proposal to create uniform European rules in this area, however narrow their scope or limited their effect, will cause a stir, with those involved using the considerable means of influence at their disposal to secure a result (both in the rule adopted and the policy direction) which is perceived to accommodate and further their interests. If the EU does act, one or more groups will claim that a victory has been secured for their own wider objectives (whether they be "freedom of the press", or "protection from media intrusion", or some other totemic principle). Against this background, the most likely outcome (as the Rome II Regulation demonstrates) is a stalemate, with the players pushing their pieces around the board without attempting to make a decisive move.

Why should the outcome be any different on this occasion, especially given the limited time that has elapsed since Rome II was adopted? Wouldn't we all be better off focussing our efforts on more pressing business, or just getting on with our holiday packing?

Mrs Wallis' Working Paper, although admirable in the breadth of its coverage, provides little cause for optimism. If anything, the debate appears to have regressed in the three years since the Regulation was adopted. Instead of the debate being centred upon a clearly focussed proposal, such as that contained in

Art. 7 of the European Parliament's Second Reading Proposal, we are left with a tentative preference for introducing a degree of flexibility (either judicial or party oriented) coupled with some form of foreseeability clause. Other options, such as reform of the related rules of jurisdiction, minimum standards of protection for privacy and personality rights and (gulp) "a unified code of non-contractual obligations, restricted to or including those arising out of violations of privacy and personality rights" are floated, with varying degrees of enthusiasm, but without any clear picture emerging as to what the problem(s) is/are at a European level and how these options may contribute to an overall "solution". Although concrete proposals will emerge, such as those identified on these pages by Professor von Hein, the debate is lacking in focus. If the European Parliament's JURI Committee has now retreated from its former, strongly held position into the legislative outback, what hope is there for its current initiative? Wouldn't it be better to wait, at least, until the full review of the Rome II Regulation by the Commission, scheduled – at least according to the black letter of the Regulation – for next year?

As the foregoing comments may suggest, my own strong preference would be to wait, and to maintain the *status quo* for the time being, for the following reasons:

1. In terms of the law applicable to non-contractual obligations arising out of cross-border publications, there is nothing in the Working Paper to suggest that the problem is a pressing one, or that immediate legislative intervention by the European Union is "necessary". "Libel tourism" may be a cause for concern in some quarters on both sides of the Atlantic, but the focus of that debate is on rules of jurisdiction and on the English substantive law of defamation, and the difficulties do appear to have been somewhat overstated. There is also, in my view, a real risk, by hasty legislative intervention, of exacerbating existing problems or creating new ones, for example by a rule of applicable law that might subject a local publication (for example, the Manningtree and Harwich Standard) to the privacy laws of a foreign country where the subject of an article is habitually resident and where the article (in hard copy or online form) has not been read except by the subject and his lawyers.
2. We are in the middle of the review of the Brussels I Regulation, whose rules (in contrast to those of the Rome II Regulation) do apply to cross-border disputes involving privacy and personality rights. That process,

which raises issues of major commercial importance (most obviously, the effectiveness of choice of court and arbitration provisions in commercial contracts) has already been drawn out, and we should not impose a further obstacle of requiring at the same time a mutually acceptable and viable solution to the question as to which law should apply in these cases. Either the Brussels I review should be allowed to proceed first, with questions concerning the law applicable to be considered thereafter, or the present subject area should be stripped out of the Brussels I review leaving private international law (and substantive law) aspects of privacy and personality rights to be considered separately, but on a firmer footing than the present debate.

3. It must be recognised that the rules of applicable law in the Rome II Regulation are not (and should not be) rule or outcome selecting. The privacy or defamation laws of the subject's country of habitual residence, or the country where the publisher exercises editorial control, or of any other country to which a connecting factor may point may be more or less favourable to each of the parties. Further, all of the Member States are parties to the European Convention on Human Rights and obliged to respect both private life (Art. 8) and freedom of expression (Art. 10) within the margins of appreciation allowed to them. Those requirements must be observed by all Member State courts and tribunals, in accordance with their own constitutional traditions, whether they are applying their own laws or the laws of a Member or non-Member State identified by the relevant local rule of applicable law. In terms of the legislative structure of the Rome II Regulation, they are a matter of public policy (Art. 26) and not of identifying the country whose law applies. It follows that the impact of rules of applicable law on these Convention rights would appear to be more practical than legal. Might a night editor at a newspaper hesitate to run a story about a foreign footballer's private life if he cannot be sure that it will not expose him and the publisher to a claim based on a "foreign law"? Might an impecunious European aristocrat step back from bringing legal action to protect his family's privacy if it requires him to pay expensive foreign lawyers in order to determine his rights? Moreover, the temptation (as in these examples) to focus on the mass media and on "celebrities" must also be resisted – the position of the web blogger or the office worker, whose rights are equally valuable, must also be considered. Any attempt to formulate a rule of applicable that balances the interests

of both parties, and facilitates the effective enforcement of Convention rights, must take account of these and other practical issues, but (despite the Mainstrat report) a sufficient evidential basis is presently lacking.

4. In view of the constitutional sensitivity of this area (acknowledged in a declaration at the time of the Treaty of Amsterdam*, although apparently not repeated upon adoption of the Lisbon Treaty), it is vital that the debate should be properly focussed and resourced from the outset. A review of the present state of the law must open up not only the Art. 1(2)(g) exception, but also the terms and effect of the eCommerce Directive and the "country of origin" principle that it is claimed to embody, as well as the interface between private international law rules and the Convention rights. The size, importance and complexity of this undertaking should not be underestimated, and the temptation for the legislator to jump in with two feet should be strongly resisted. Laudably, Diana Wallis has not made this error, but her Working Paper demonstrates how much remains to be done to identify the problem and assess potential solutions. Significant additional resources, both within and outside the European legislative machine, will be required in order to create even the potential for a satisfactory outcome to the process. In the present climate, it may be questioned whether this is the best use of scarce resources. Sensible and sensitive, pan-European legislation regulating private international law or other aspects of civil liability for violations of privacy and personality rights may be thought "desirable", but is it really necessary and, if so, is it achievable and at what cost?

* *Declaration on Article 73m of the Treaty establishing the European Community*

> *Measures adopted pursuant to Article 73m of the Treaty establishing the European Community shall not prevent any Member State from applying its constitutional rules relating to freedom of the press and freedom of expression in other media.*

Hartley on The Problem of “Libel Tourism”

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The problem

As Diana Wallis points out, libel tourism is now recognized as a serious problem. Finding a solution, however, is not so easy. There are a number of possibilities.

Harmonization of substantive law?

Although some people have suggested a limited measure of harmonization as regards substantive law, this would not be desirable. The law of defamation and privacy reflects the balance a particular society regards a right between two important rights: freedom of speech and protection of reputation. This is a delicate cultural matter, and the relative importance of these values differs greatly between different cultures. Even in Western Europe, there are important differences. In France, for example, the right of privacy is strongly protected; in England, it is hardly protected at all: the English feel that if something is true, you should (usually) be allowed to say it. It would be wrong for the EU to establish Union-wide norms in this area.

A uniform choice-of-law rule?

It is sometimes said that a uniform EU choice-of-law rule in this area would lead to greater predictability and certainty. This is a misconception. At present, the choice-of-law rule applicable in a case will be that of the country in which the litigation arises. In most Member States, these rules are fairly clear and easy to apply. There is no reason to believe that an EU rule would be any clearer or lead to more a predictable outcome. Indeed, the contrary is likely to be the case, since EU legislation is the product of negotiations between the Member States and it has to be based on consensus. In the case of a contentious matter – and defamation is nothing if not contentious – this is bound to lead to a complicated text. If proof of this is needed, one only has to look at the convoluted and opaque text in the Rome II Regulation on products liability. No one can say that the

adoption of this measure has lead to greater certainty and predictability.

It might, however, be argued that, even if the EU measure was obscure and difficult to apply, it would at least uniform, so that the same choice-of-law rule would apply wherever the action was brought. It might be thought that this would lead to greater predictability. Even this is wrong. The fact that the same substantive law is applied does not mean that it will be interpreted in the same way. Defamation is very much a question of value judgment, value judgment based on cultural norms. What is defamatory to a Greek might not be defamatory to a Swede. Moreover, what would constitute a justification in one country might not do so in another.

In addition to these differences of values and attitudes, there are simple questions of procedure. Whether a claimant can bring his action at all will depend on whether or not he can obtain the services of a lawyer. This may depend on whether legal aid is available or whether libel proceedings can be brought on the basis of a conditional or contingent fee agreement. The defendant may have a similar problem. The enormous fees charged by English libel lawyers can deter defendants from even fighting the case: they may simply give up and admit they were wrong, even if they know they were right.

For these reasons, a uniform choice-of-law rule is unlikely to lead to greater certainty and predictability. Moreover, its adoption would mean that references would have to be made to the ECJ. This could easily add two years to the length of time needed to obtain a final judgment.

Even if it were thought desirable to have a uniform choice-of-law rule, it is hard to see what rule would be satisfactory. At present, most Member States apply the law of the place of publication or the place where harm occurs (sometimes combined with the law of the forum). This, however, gives rise to serious problems. It is difficult to define where the harm occurs (especially in the case of the Internet), and it might not be obvious where the damage is felt.

Another possibility is the law of the claimant’s domicile or habitual residence. However, this would not be acceptable without major qualification. We must remember that the Rome II Regulation applies not just where the choice of law is between the legal systems of the EU States: it also applies where the potentially applicable law is that of a non-Member State. If we adopted a rule that the law of

the claimant's habitual residence applied, a dictator in a non-Member State could change the law of his country to say that any criticism of him (even if true) was defamatory and would lead to a huge damage award. Would we want to apply such a law? If we try to solve the problem by adopting a proviso that the free-speech law of the forum will always override foreign defamation law, the practical result will be that the lex fori will apply in defamation cases, because all cases will be defended on freedom-of-speech grounds. This is what happens in the United States where state defamation law has been eclipsed by federal free-speech law (the First Amendment). It should be noted that a uniform rule that the law of the forum applies will lead to no greater predictability than the application of the choice-of-law rule of the forum. I both cases, you cannot know the applicable law until you know what the forum will be.

The media of course want a uniform rule that applies the law of the defendant's place of establishment. This would be nice for them, but not so good for the citizen. British newspapers could ride roughshod over French privacy law and publish the results in France, while American media could defame public figures in Europe with impunity – telling lies about them as long as it could not be proved that they were motivated by malice.

For these reasons, no attempt should be made to adopt a uniform choice-of-law rule.

Jurisdiction

The last possibility is to do something on the jurisdictional front. Jurisdiction in libel is already covered by the Brussels I Regulation. Under this, the courts of the defendant's domicile have jurisdiction. No objection can be taken to this. If the defendant is domiciled in another Member State, Article 5(3) gives jurisdiction to the courts of the place where the harmful event occurred. In Shevill v Presse Alliance SA, the ECJ held that this allows the claimant to sue in the courts for the place where the material is distributed (though the claim must be limited to damage flowing from the copies of the publication distributed in the territory of the forum). It is this provision that can lead to libel tourism, since the claimant might choose a forum with which he has no connection simply because he is most likely to win there.

The material must of course be published in the territory of the forum. With the

advent of the Internet, however, this requirement is almost meaningless. Since most media outlets (newspapers, magazines, and TV stations) have their own websites, almost all defamatory material that is published in the media is also available on the Internet. So if material is regarded as published in a country if it is accessible on the Internet there, almost everything can be regarded as published everywhere.

It is suggested that it is in this area that a new legal initiative is needed at EU level. However, this must wait until the review of the Brussels I Regulation takes place.

Von Hein on Rome II and Defamation

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Diana Wallis deserves praise for her lucid and insightful working document on a possible amendment of the Rome II Regulation with regard to violations of rights relating to the personality. In devising a conflicts rule for this special type of tort, one has to take into account that, although the Rome II Regulation is at present not applicable to this group of cases, the European legislators are no longer operating on a clean slate, because any new conflicts rule will have to fit into the basic doctrinal structure of the Regulation. Moreover, Recital No. 7, which mandates a consistent interpretation of Rome II and Brussels I is of particular importance here because of the ECJ's *Shevill* judgment (C-68/93), which established the so-called mosaic principle.

There are mainly two possible approaches: The first one would be to provide that the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality shall be the law of the country where the victim is habitually resident at the time of tort. This solution is popular in academia (for those who read German, I recommend the excellent contribution by

my good friend Michael von Hinden to the *Festschrift* for Jan Kropholler [2008], p. 575), and a corresponding amendment of the Rome II Regulation has been recommended on February 19, 2010 by the German Council for Private International Law, a group of German P.I.L. professors advising the Federal Ministry of Justice (full disclosure: I am a member of this group, but did not participate in the vote on this issue). This proposal certainly has the virtues of simplicity and guaranteeing a protection of the victim in accordance with the social standards that he or she is accustomed to. With due respect, it has some drawbacks as well. From a political point of view, one must not forget that this approach has been on the table before, in the Commission's preliminary proposal for a Rome II Regulation of May 2002. It failed then, after protests from the media lobby, and I really doubt whether it would survive this time. From a doctrinal point of view, its main disadvantage is that V.I.P's – who are the main targets of the "yellow press" – frequently reside in tax havens. It would be a dubious irony of European conflicts legislation if the laws of third states such as Switzerland or tiny Monaco were to govern the freedom of the E.U. press more often than the laws of the Member States. Such an approach would be insensitive to the legitimate interests of E.U. newspaper readers, TV viewers and other media consumers in accessing legal content. Finally, the habitual residence of the victim is out of tune with the jurisdictional principles of the ECJ's *Shevill* judgment.

A different solution would result from closely tracing the existing framework of Rome II. First of all, in line with Article 4(1), the place of injury (i.e. here: the distribution of the media content) should be paramount, unless there are good reasons to deviate from this rule. Following the example set by Article 5(1) on product liability, however, one should restrain this connection by way of a foreseeability defense, in order to take the legitimate interests of publishers into account. Moreover, party autonomy (Article 14), the common residence rule (Article 4(2)) and the closest connection exception (Article 4(3)) should be respected. A good reason to deviate from the place of injury exists with regard to the right of reply, because such relief should be granted swiftly and is interim in nature. This was already recognized both by the Commission and the Parliament in their earlier proposals of 2003 and 2005. A specific clause on public policy appears unnecessary, because Article 26 is fully sufficient to deal with any problems in this regard. A special clause safeguarding only the freedom of the press would be hard to legitimize in light of the fact that a lack of protection against violations of privacy may contravene human rights of the victim as well. It

should be remembered that in the famous case of *Princess Caroline of Hanover v. Germany*, the Federal Republic was condemned by the European Court of Human Rights (judgment of June 24, 2004, application no. 59320/00) not because the Federal Constitutional Court had not respected the freedom of the press, but, on the contrary, because it had failed to protect the princess against intolerable intrusions of *paparazzi* into her private life. Apart from that, there should be a sufficiently flexible, general rule on violations of personality rights and no special rule concerning cyberspace torts. Frequently, potentially defamatory statements are often circulated via multiple channels (print and internet), so that differing outcomes are hard to justify. Any new rule should rather be slim and adaptable to technological developments rather than fraught with ponderous casuistics As far as the E-Commerce Directive is concerned, the precise demarcation between the Directive and Rome II should be left to Article 27 and the ECJ, where a pertinent case is currently pending (case C-509/09).

Specific problems arise in cases involving multi-state violations. Here, both the *Shevill* judgment and the model developed for multi-state restrictions of competition (Article 6(3)(b)) argue for a modified codification of the so-called mosaic principle. By adopting this approach, jurisdiction and the applicable law will regularly coincide, which saves time and costs for all the parties involved. For persons enjoying world-wide fame, it creates a welcome incentive to concentrate litigation in the defendant's forum. For rather unknown persons, it does not introduce any additional burden, because their reputation will usually only be affected in their home country anyway.

Taking the above considerations into account, I would like to propose the following rule, which builds upon earlier proposals and the existing regulation. Details concerning the interpretation of notions such as "reasonably foreseeable" or "direct and substantial" could be fleshed out in the recitals, where further guidance on public policy may be given, too.

> ***Article 5a Rome II – Privacy and rights relating to personality***
>
> *(1) Without prejudice to Article 4(2) and (3), the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country where the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected. However, the law applicable shall be the law*

of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee substantial consequences of his or her act occurring in the country designated by the first sentence.

(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and this person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seised.

(3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

(4) The law applicable under this Article may be derogated from by an agreement pursuant to Article 14.